Supreme Court, U.S.
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No. 99-536

IN THE

Supreme Court of the United States

ROGER REEVES,

Petitioner,

v.

SANDERSON PLUMBING PRODUCTS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Sanderson Plumbing Products, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

Contrary to the Statement of the Case as stated by Petitioner, Roger Reeves, there is much more to be considered with respect to the proceedings. As the record in the lower court will reflect, the Court of Appeals for the Fifth Circuit succinctly and correctly found that a determination must be made at the conclusion of the evidence as to whether one such as Petitioner "presented sufficient evidence that his age motivated Sanderson's employment decision". (Op. at 8(a)).[1] The Court of Appeals then found that there was insufficient evidence for a jury to conclude that Respondent, Sanderson Plumbing Products, Inc., discharged Petitioner because of his age. As will be shown hereinafter, regardless of whether the Court of Appeals for the Fifth Circuit used what Petitioner denominates as "pretext-plus" or "pretext only", the result is the same. This was not a case for submission to a jury and hence, this is not a case for this Court to grant *certiorari* to decide what Petitioner cites as a conflict among the circuits.[2]

After an adverse jury determination in the lower court (and after the lower court overruled Respondent's

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[1] References to the Court of Appeals opinion will be by reference to the page denominations in Petitioner's Appendix.

[2] Indeed, as will be shown hereinafter, the factual scenario in this case does not present to this Court the appropriate case to resolve what the Petitioner contends is a conflict among the circuits. To be sure, the factual setting in this case squarely accommodates both what Petitioner denominates as "pretext-plus", as well as "pretext only". Thus, *certiorari* should not be granted in this case.

Motion for Judgment as a Matter of Law pursuant to Rule 50 of the Fed. R. Civ. Proc.) and after rejection and overruling of Respondent's post-trial Motion for Judgment as a Matter of Law, Respondent appealed to the United States Court of Appeals for the Fifth Circuit and in an opinion rendered on April 22, 1999, the Court of Appeals found there was insufficient evidence to submit the case to a jury. Thereafter, Petitioner filed a Petition for Rehearing *en banc*, which was denied by the Court of Appeals on June 9, 1999.[3]

COUNTER-STATEMENT OF THE FACTS

Respondent is a company involved in the manufacture of toilet seats and covers. (R. Vol. 3 at p. 147). The company has approximately 850 employees and at the time of the trial, the President of the company was Sandra Sanderson. *Id.* at p. 89. Petitioner was a supervisor in a department of the company known as the Hinge Room. (R. Vol. 3 at p. 147). Russell Caldwell, who was 45 years of age, was Manager of the department. (R. Vol. 3 at pp. 153-155). The other supervisor in the department was Joe Oswalt, approximately 35 years of age. (R. Vol. 4 at pp. 210-211). Reeves was terminated on October 23, 1995 for unsatisfactory work performance in his assigned job responsibilities, failure to follow company policy and procedures, and falsification of attendance records of employees under his supervision. Caldwell was also terminated for the same reasons (R. Vol. 3 at pp. 153-155) and if Oswalt had still been employed and had not just quit, he would also have been

[3] Interestingly enough, Point II of Petitioner's argument was never presented to nor considered by the Court of Appeals in Petitioner's Petition for Rehearing, which is in and of itself fatal to Petitioner's argument before this Court on that point.

terminated by Respondent for the same reasons as that of Petitioner and Caldwell. (R. Vol. 4 at pp. 210-211).

I. RESPONDENT'S MANAGERIAL AND EMPLOYEE COMPLEMENT

As clearly shown in the Record, at the time of Reeves' termination, there was one manager who was 68 years old, one manager who was 62 or older, two people who had previously retired from the Company at age 65 in managerial positions and had since returned, one being 72 and the other in the late sixties. There were 20 management people over the age of 50, 12 in the category of 45 to 49 and numerous managers over the age of 60. (R. Vol. 2 at pp. 155-156). This, of course, is significant factual documentation that Petitioner repeatedly, and conveniently, neglects to mention.

II. PETITIONER'S BACKGROUND AND JOB PERFORMANCE

Petitioner acknowledged that one of his main functions as a supervisor was to make sure people under his supervision were at work and on time. (R. Vol. 3 at p. 36). He also further recognized that he was required to note absences or tardiness of employees under his control. (*Id.* at pp. 38-39). Reeves was well familiar with the system and procedure in which he was to report such absences or tardiness and/or the, more or less, fail-safe systems that would come back to him as a supervisor at which time he could make sure he had committed no prior errors. (*Id.* at p. 39-43).

Because of repeated complaints by the Department Manager Caldwell concerning numerous absences, which were not reflected in records being

forwarded to Human Resources, an audit was performed on the Hinge Room. (R. Vol. 4 at pp. 203-204). Numerous errors were found with respect to Oswalt, Reeves, and Caldwell for the months of July, August, and September of 1995. (*Id.* at pp. 205-206, 275-276; Weekly Reports Ex. D-3; Monthly Reports Ex. D-4). A summary of these errors was prepared by persons having no relationship or involvement in the termination of the three. (*Id.* at pp. 277-278; Summary Ex. D-5; Ex. D-5(a)). With respect to Reeves, Caldwell, and Oswalt, simply put, the three, respectively, failed to note and properly reflect that employees were absent or tardy, which allowed employees to bypass disciplinary action. (R. Vol. 3 at pp. 127-128; Vol. 4 at pp. 205-206). Moreover, there were instances where time records were misrepresented or wrongfully adjusted, which resulted in overpayment of employees. (R. Vol. 3 at pp. 127-128). Again, the errors and misrepresentations were summarized by Trial Exhibits D-5 and D-5(a).

Clearly, the legitimate reasons leading to the termination were not only shown to be true but although counsel for Petitioner repeatedly ignores the same, *Petitioner readily admitted that he had made many errors on time records but simply claimed that in his "opinion" that did not warrant dismissal.* (R. Vol. 3 at pp. 51, 61). Petitioner's counsel, on examination of the witness of Respondent who made the audit, commented as follows:

> Then the other people who are listed as employees of the special line, I concede there are numerous violations. (R. Vol 4 at p. 294).

Obviously, this is a very telling admission and is important and one of the many reasons why this case

should not have been submitted to the Jury and why the Court of Appeals is correct!

The much-maligned person Petitioner would denominate as the "culprit", Director of Manufacturing Chesnut, did not make the termination decision but when given the results of the audit, discussed the matter with Tom Whitaker, Vice President of Operations and Dana Jester, the Vice President of Human Resources. (R. Vol. 4 at pp. 208-209). Jester, who was 56 years old at the time (R. Vol. 4 at p. 315), independently reviewed the records. (*Id. at p. 208*). His review confirmed there were numerous instances of errors. *Id.* (*See, also,* R. Vol. 4 at pp. 314, 318-321). Jester recommended termination and in his opinion it was one that needed to be made and was a particularly difficult decision since it not only involved Reeves but also involved Caldwell, whose wife worked for Jester in Human Resources. Nevertheless, age had nothing to do with the decision and the recommendation "was based strictly on job performance". (R. Vol. 4 at p. 315).

Although Jester, Whitaker, and Chesnut independently recommended dismissal, the decision to discharge was made by President, Sandra Sanderson. Clearly, her decision to terminate was in no way related to age. (R. Vol. 3 at pp. 152-153). Indeed, her testimony is so noteworthy that it is recounted here in full:

> When a person manages a company or a department, they have to depend on lower management to do their job. In essence, you have to trust people. You trust them not only to take their numbers to contribute to the profitability of the company, but you have to trust them to report accurate pay

records. The payroll is the largest expenditure a company has. And I trusted that it was being reported accurately by all departments.

This termination was especially difficult because I've known of Roger Reeves since I came to town in 1969. And, of course, I worked with him rather closely sometimes from 1984 until he was terminated. I spent a lot of time on the line talking to Roger Reeves. I think I know Roger quite well. Mr. Caldwell has not been with the company long, but he's a very likeable person. His wife is also employed by our Human Resources Department, and she's a very valuable employee. So that also, you know, I had to think about that too.

But the fact remained we had evidence or evidence was presented to me that in my opinion Mr. Reeves, Roger, had not done his job properly. He had not coded employees properly so that they could be disciplined according to our union contract. This can cause us a problem if we could have a grievance or an unfair labor practice. In one department, if you don't discipline people per the contract and you do in another department.

Then there was the fact that we were actually paying people for not working. How long this had been going on? Was this just a three-month window? I don't know. It could have been going on a long time. I trusted that everyone was doing the time

sheets correctly. And they were going to data processing, not once but many times. And Roger has heard me, and so has Russell and everyone in that company, stress Sanderson's consistency in your disciplinary actions and accuracy on your payroll numbers. Do the daily time sheets.

So, it was a difficult decision. You never want to lose a long-term employee. You lose experience, you lose knowledge. It's a loss to the company. But a superior or manager or director has to set an example for the employees that they supervise. These employee knew that they were being -- those that were being overpaid, they knew that. These employees knew when they were late and they knew when they were not disciplined. And this was the example being set for them, well, we can get by with this. Management has to present an example. They have to be the example and the leader to follow.

So, faced with what was presented to me, I decided that this was justifiable grounds for termination, not only for one who did not code it correct, who did not properly administer the payroll records, but also for his manager who approved his actions. No, I didn't want to do it. And sitting here today, you know, I wish I weren't sitting here, but I honestly feel like I did the right thing. And I feel like if anyone in my position and anyone in another company falsified company records it's grounds for

termination. But age had nothing to do with it.

(R. Vol. 3 at pp. 153-155).

In addition to Petitioner's problems in 1995 that led to his dismissal, in 1993, a study was made of the Hinge Room, which concluded that Reeves' line was very lax, people were not being made to follow general work rules, employees were late returning from break, and employees took unscheduled breaks. (R. Vol. 4 at p. 198). As a result, Russell Caldwell and then Director of Manufacturing Everett Livingston (not Chesnut), placed Petitioner on probation for unsatisfactory work performance, which included, among other things, not counseling people or writing up people for coming in late and not following the absentee policy.[4] (R. Vol. 4 at pp. 198-199).

III. ALLEGED AGE COMMENTS AND PROOF OF DISCRIMINATION

Out of 379 pages of trial testimony, Petitioner's only "evidence" of age are two alleged comments attributed to Powe Chesnut, as clearly found by the Court of Appeals to be only one of four decision-makers. Petitioner testified in this regard as follows:

> One comment he made I was so old I must have come over on the Mayflower. Another one, I was working on a machine, walked

[4] Chesnut was not involved in placing Petitioner on probation and subsequent to his being placed on probation, and after Chesnut became the Director of Manufacturing, the latter gave Petitioner a wage increase and at a time when Petitioner was 55 years old. (R. Vol. 3 at p. 65).

> up to me, I couldn't get it running, told me I was too damn old to do my job.[5]

(R. Vol. 3 at p. 26).

According to Petitioner, these were statements made to him not by the decision-maker Ms. Sanderson – but by Chesnut, only one of the three who made the recommendation to the President of the company to terminate and he supposedly was informed by Mr. Chesnut two months before he was dismissed in this regard. *(R. Vol. 3 at p. 26)*. Chesnut denied making the statement with reference to Petitioner being "too old for the job" and denied making any comment relative to "the Mayflower". *(R. Vol. 4 at pp. 215-216)*. It is significant here and it is uncontradicted that nicknames were frequently used and that, for instance, Chesnut stated that he was referred to as the "walking boss". Moreover, there was an employee who worked out on the regular line (where Reeves was supervisor) for many years who was referred to as "the old man". As a matter of fact,

[5] It is, of course, noteworthy that at the trial Reeves admitted that the reference to the Mayflower was only said to him one time and he does not remember the date this statement was made. *(R. Vol. 3 at p. 59)*. He was further reminded that in his deposition he never mentioned that he had been informed by Chesnut that he was too old to do the job but only made reference that on one occasion, Chesnut mentioned that he must have come over on the Mayflower. Indeed, Reeves was reminded of the fact that in his deposition, he was asked other than the Mayflower statement was there anything else stated and his answer was "I don't know of anything else". Indeed, at the trial, Reeves admitted this was true "at that time". *(R. Vol. 3 at p. 60)*. Reeves was never able to explain this obvious discrepancy in his testimony -- and yet he was under oath on both occasions!

Roger Reeves referred to this employee (John Williams) as the old man and that's basically all he ever called him. *(R. Vol. 4 at p. 215).*[6] Indeed, at Sanderson Plumbing, there are a lot of people who have retired and who have come back to work on a part-time basis. Many of them are often referred to as the old man. *(R. Vol. 4 at p. 216).* One employee named Clyde Cook retired when he was 62 years of age but returned and continues to work and is now 73 and is often referred to by the employees as the old man. *(R. Vol. 4 at p. 216).*

Additionally, Lucille Reeves, who was not involved in either the recommendation to terminate or the termination, stated also that the company is known for its nicknames. Her name is Lucille but her nickname is "Sill" and she referred to a Manager there who is referred to as "Snake". She pointed out their Personnel Manager is referred to as "that woman" and she also corroborated the fact that Reeves would call an employee by the name of John Williams "old man". *(R. Vol. 4 at p. 280).*

It is uncontradicted that Mrs. Sanderson, the person who terminated Petitioner, had no information as to whether Chesnut ever made such a statement to Reeves (R. Vol. 3 at p. 160) because quite frankly that was not a factor in her decision. (R. Vol. 3 at pp. 152-153).

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[6] The Court should be mindful of the fact that after Chesnut and Lucille Reeves testified *Petitioner took the stand on rebuttal but never denied referring to Mr. Williams as "the old man" -- yet Reeves now wants to attribute much to the alleged statements of Chesnut -- also again, not the person who terminated Petitioner!*

Thus, upon reflection, it is clear that not only was there no showing of the second prong of the pretext standard - evidence of age discrimination - but no jury question as to pretext on the first prong - matters relating to the articulated reason for the discharge.

REASONS FOR DENYING THE WRIT

I.

THE WRIT SHOULD BE DENIED INASMUCH AS THE DETERMINATION OF THE FIFTH CIRCUIT OF NO JURY ISSUE WAS SUPPORTED BY THE UNDISPUTED FACTS AND THE APPLICABLE LAW OF ALL CIRCUITS.

Petitioner, initially, would have this Court refer to only one statement from St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993). (*Pet. for Writ of Cert. at p. 4*).

This Court in St. Mary's reaffirmed that once a *prima facie* case is established, then the burden of production shifts to the defendant although the burden of persuasion always remains with the plaintiff. *Id. at* 507. Moreover, St. Mary's held that once the employer meets this burden, then the presumption made by the *prima facie* showing "drops out of the picture", *Id.* at 511, and, indeed, is "no longer relevant". *Id.* at 510-11; Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255, n.10 (1981). To be sure, as set forth in St. Mary's, once a defendant sets forth the legitimate, nondiscriminatory reason (there is no issue in the case *sub judice* in this regard), a plaintiff must demonstrate "that the proffered reason was not the true reason for the employment decision and that race was". St. Mary's at 508. Indeed, the court in St. Mary's made it clear that one such as

Petitioner has the burden to show that the proffered reason was false and *that the real reason was discrimination*. *Id.* at 515. Your Honors have further reminded that "it is not enough ... to disbelieve the employer".[7] *Id.* at 519. Finally, St. Mary's held that a reason cannot be proved to be a pretext for discrimination unless it is shown "both that the reason was false and that discrimination was the real reason". *Id.* at 515.

The significance of the above discussion from St. Mary's is important when considering Petitioner's argument that since there is a conflict among the circuits relative to "pretext-plus" and "pretext only", the Court should grant *certiorari* in this case to resolve this alleged conflict.

However, the significant point is that even under what Petitioner has denominated as the "pretext only" rule, Petitioner was not entitled to a jury determination of the case *sub judice*. To be sure, Manzer v. Diamond Shamrock, 29 F.3d 1078 (6th Cir. 1994) would represent perhaps what Petitioner denominates as a "pretext only"

[7] Just as Petitioner seeks to read St. Mary's out of context, the Court in St. Mary's clearly pointed out that there was no inconsistency between the statement that "rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination" and the Court's later statements that (1) the plaintiff must show "both that the reason was false and that discrimination was the real reason" and (2) that "it is not enough to disbelieve the employer". As the Court clearly opined in order to reject the defendant's proffered reason as enough to sustain a finding of discrimination, *there must be a finding of discrimination*. *Id.* at 511, n.4. To be sure, and as shown throughout in the case *sub judice*, there was no such evidence upon which to base such a finding.

circuit. The significance of Manzer is that in showing pretext and to make a case on the credibility of the employer's explanation, the plaintiff is required to show by the preponderance of the evidence either:

> ... (1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate his discharge, or (3) that they were insufficient to motivate discharge. ... That the first type of showing is easily recognizable and consists of evidence that the proffered bases for the plaintiff's discharge never happened, *i.e.*, that they are factually false. ... The third showing is also easily recognizable and, ordinarily, consists of evidence that other employees, particularly employees not in the protected class, were not fired even though they engaged in substantially identical conduct to that which the employer contends motivated its discharge of the plaintiff. These two types of rebuttals are direct attacks on the credibility of the employer's proffered motivation for firing Petitioner and, if shown, provide an evidentiary basis for what the Supreme Court has termed a suspicion of mendacity....
>
> The second showing, however, is of an entirely different ilk. There, the plaintiff admits the factual basis underlying the employer's proffered explanation and further admits that such conduct could motivate dismissal.... In such cases, the plaintiff attempts to indict the credibility of

> his employer's explanation by showing circumstances which tend to prove that an illegal motivation was more likely than that offered by the defendant. ...

29 F.3d 1084.

Indeed, Manzer stated as follows that:

> If the bare bones elements of a plaintiff's *prima facie* case was sufficient to make this showing, however, the entire burden-shifting analysis of McDonnell Douglas and its successors would be illusory. No case could ever be culled out after the *prima facie* stage and every case would have to be determined by a jury. We do not believe that this was the intent of Congress or the outcome envisioned by the Supreme Court in its long line of cases implementing employment discrimination legislation. Accordingly, we hold that, in order to make this type of rebuttal showing, the plaintiff may not simply rely upon his *prima facie* evidence but must, instead, introduce additional evidence of age discrimination.

29 F.3d 1084.

Thus, even in a circuit that is, as Plaintiff would have us believe, a "pretext-only" circuit, there still is insufficient factual underpinning in the case *sub judice* to warrant submission to a jury.

Thus, using this standard, it is clear that Petitioner is entitled to no relief and the Writ should be denied. For instance, with respect to Point 1 (that the proffered

reasons had no basis in fact), there is no doubt and it is undisputed that not only Petitioner but the two other management employees in his department committed the infractions in question, which led to the discharge of Petitioner's supervisor and would have led to the discharge of the younger supervisor had he still been employed there. With respect to Point 2 (that the proffered reasons did not actually motivate his discharge), there is no showing at all to the contrary, no evidence to the contrary, and indeed, the factual background relative to the termination of the younger supervisor over Petitioner and the fact that the 35-year-old supervisor would have been terminated had he been there, plus the numerous instances by statistics of employees over 50 in supervisory positions clearly defeat any attempt of Petitioner to show that there was a factual issue that "the proffered reasons did not actually motivate his discharge". With respect to Point 3 (that the proffered reasons were insufficient to motivate discharge), obviously, there is no issue here and Petitioner does not even attempt to contend that the numerous errors made not only by Petitioner but his two colleagues in the department would have been and were insufficient to motivate discharge.[8]

Other circuits referred to by Petitioner as "pretext only" circuits have adopted the same analysis as Manzer and each require some showing of discrimination. *See,* Jackson v. E.J. Brach Corp., 176 F.3d 971, 983 (7th Cir. 1999). (Indirect evidence of pretext showing that an

[8] In this regard, it is again more than noteworthy to recall that Petitioner's own counsel, during examination, conceded that the violations committed in the same department by Petitioner's young, supervisor colleague (age 35) were "numerous violations". (R. Vol. 4 at p. 294).

employer's proffered reasons are not credible may be made by demonstrating that the reasons are factually baseless, were not the actual motivation for the discharge, or were insufficient to motivate the discharge.) Moreover, in Pilditch v. Bd. of Educ. of City of Chicago, 3 F.3d 1113 (7th Cir. 1993), the Seventh Circuit stated that under Hicks a plaintiff "is left to unmask, if he can, the reasons proffered by the employer as fake. Beyond this, he must also prove that the true reason for his firing was discriminatory". *Id.* at 1117-1118. Also, *see*, Shorter v. ICG Holdings, ___ F.3d ____, (1999 LEXIS 19279 at *9-10 (10th Cir. 1999)) (a plaintiff can establish pretext by showing either that a discriminatory reason more likely motivated the employer or that the employer's proffered explanation is unworthy of credence). Thus, these circuits have adopted the same reading as the Sixth Circuit in Manzer.

While Petitioner abandons any argument that there was direct evidence of discrimination (*see p. 7 of the Petition wherein Petitioner concedes that "because of the unavailability of direct evidence, this Court adopted the indirect burden-shifting method of proof*), in any event, the alleged statement attributed to Powe Chesnut is inadequate. All circuits are in agreement on this. *See, e.g.*, Opinion of Fifth Circuit at p. 6A of Appendix (stray remarks, i.e., comments that are vague and remote in time are insufficient to establish discrimination); Brown v. CSC Logic, Inc., 82 F.3d 651, 655 (5th Cir. 1995) (statements must be proximate in time to the terminations and related to the employment decision at issue, otherwise, a stray remark); Hoffman v. MCA, Inc., 144 F.3d 1117, 1121-22 (7th Cir. 1998) (in order to raise a genuine issue of material fact under the direct method of proving age discrimination, defendant's comments on which plaintiff relies must be contemporaneous with and

related to the firing, and made by the decision-maker); Shorter v. ICG Holdings, cited *supra* at *5-7, 14 (plaintiff must still show some nexus between the statements and the defendant's decision to terminate the employee); Simmons v. OCÉ-USA, Inc., 174 F.3d 913, 916 (8th Cir. 1999) (absent a causal link between the racial comments and the adverse employment decision, statements classified as statements by a decision-maker, are best classified as unrelated to the decisional process); *See, also,* Davidson v. Quorum Health Group, Inc., 1 F.Supp.2d 1321, 1325 (N.D.Ala. 1997); Smith v. The Thresholds, 1999 WL 410030 at *7 (N.D.Ill. 1999).

Simmons v. OCÉ-USA, Inc., cited *supra*, clearly sets forth a logic which applies with full force to the case *sub judice* when the Eighth Circuit held:

> Given the comprehensive objective evidence presented by OCÉ of Simmons' poor job performance, the offensive remarks made by Curless outside of the decision-making process, without more, are not enough to create a trial-worthy issue of pretext.

174 F.3d at 916.

To be sure, that is the identical situation with Petitioner's admission of violations of company policy and rules set forth early in the factual scenario of this brief (including the admission by Petitioner's counsel that identical infractions committed by the "younger" Oswalt were serious violations). Thus, the alleged age comments of what is really a non-decision-maker, Powe Chesnut (but if we accept Petitioner's argument only one of four decision-makers), does not constitute evidence that would create a jury issue.

Thus, again, and under any standard elicited, Petitioner's argument fails and the holding of the Court of Appeals for the Fifth Circuit was appropriate.

II.

THE FIFTH CIRCUIT'S APPROACH OF WEIGHING ALL THE EVIDENCE WAS NOT INAPPROPRIATE NOR WAS ITS STANDARD FOR JUDGMENT AS A MATTER OF LAW UNDER RULE 50 INAPPROPRIATE.

Initially, the Court must be mindful that here Petitioner raises an issue not raised in the Court of Appeals on Petitioner's Petition for Rehearing *en banc*. Indeed, the only issue raised by the Petitioner before the Court of Appeals on rehearing was the argument that "By finding that age-based comments by the person who caused the termination decision, near in point of time to the termination decision, was insufficient evidence of age discrimination, the panel contravened decisions of this court". (Pet. for Rehearing *en banc*, p. 7).[9] This Court has long held that it will decline to consider questions presented in the Petition for Writ of *Certiorari* that have not been considered by the lower court. *See, e.g.*, Tacon v. State of Arizona, 410 U.S. 351, 352 (1973) and Patrick v. Burget, 486 U.S. 94, 99, n.5 (1988).

Even if the Court considers this argument, Petitioner's argument on the merits is insufficient. Petitioner argues that the McDonnell Douglas methodology should prevail throughout. However, this

[9] Excerpts from Petitioner's Petition for Rehearing *en banc* showing the only issue presented and the argument is attached hereto as Appendix A to this Response.

Court has repeatedly held that such is not the case. In St. Mary's Honor Ctr. v. Hicks, 509 U.S. at 519, wherein this Court held:

> ... The McDonnell Douglas methodology was never intended to be rigid, mechanized, or ritualistic.... Rather, once the defendant has responded to the plaintiff's *prima facie* case, the district court has before it all the evidence it needs to decide not (as the dissent would have it) whether defendant's response is credible but whether the defendant intentionally discriminated against the plaintiff.

Thus, in essence, to follow the mandates of St. Mary's and regardless of whether there is a distinction between "pretext-plus" and "pretext only", evidence presented both by a plaintiff and a defendant must be considered in order to determine whether or not McDonnell Douglas methodology has been exhausted. Indeed, in employment discrimination cases, the Court is called upon to make a determination as to whether there is a factual issue that the defendant intentionally discriminated against the plaintiff and at the point in which the District Judge was presented with Respondent's Motion for Judgment as a Matter of Law and at the point in which consideration was given to the appeal by the Court of Appeals for the Fifth Circuit, the only question then was to decide whether there was evidence that "the Defendant intentionally discriminated against the Plaintiff". U.S. Postal Serv. Bd. of Govenors v. Aikens, 460 U.S. 711, 715 (1983). Thus, regardless of whether the Court should consider all the evidence or just the evidence in support of the nonmovant is immaterial in this case when we recall that under either

standard (as enunciated earlier in this Response) there was insufficient evidence of pretext to submit the issue to the jury. Further comment here would reiterate the obvious.

CONCLUSION

When all is said and done, the Petition fails to warrant the grant of a Writ in this case. In essence, what Petitioner really complains of is that he did not think the decision of his employer was correct and did not think that his ignoring and violating work rules of his employer should have mandated discharge. Petitioner presupposes that Respondent did not like him. Of course, it is beyond dispute that dislike is not enough to prove pretext. Waggoner v. City of Garland, Tex., 987 F.2d 1160, 1165-66 (5th Cir. 1993); Grimes v. Tex. Dept. of Mental Health, 102 F.3d 137, 143 (5th Cir. 1996). Moreover, *The Age Discrimination Act* was never intended to be a vehicle for judicial second-guessing of business decisions nor was it intended to transform the courts into personnel managers. *See, e.g.*, Ross v. Univ. of Tex. San Antonio, 139 F.3d 521, 527 (5th Cir. 1998). Perhaps the Second Circuit in Norton v. Sam's Club, 145 F.3d 114 (2nd Cir. 1998) provided clear insight to the role properly accepted by the Court of Appeals for the Fifth Circuit in finding no jury issue when it stated:

> ... [F]iring someone for taking a long lunch on a day when he was coping with serious family problems might seem to some to be unduly harsh, but the ADEA does not make employers liable for doing stupid or even wicked things; it makes them liable for discriminating, for firing people on account of their age. The Record in the instant case

> is devoid of evidence, direct or circumstantial, sufficient to support a finding that Sam's Club fired Norton because of his age.

Id. at 119.

Simply put, the Petition is without merit and should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX — PETITION FOR REHEARING EN BANC DATED MAY 20, 1999

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CAUSE NO. 98-60334

ROGER REEVES,

Plaintiff/Appellee,

VERSUS

SANDERSON PLUMBING PRODUCTS, INC.,

Defendant/Appellant.

PETITION FOR REHEARING EN BANC

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI, EASTERN DIVISION HONORABLE L.T. SENTER, JR., UNITED STATES DISTRICT JUDGE

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Appendix

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Cause No.: 1:98-60334

ROGER REEVES,

Plaintiff/Appellee,

VERSUS

SANDERSON PLUMBING PRODUCTS, INC.,

Defendant/Appellant

Defendant/Appellant

CERTIFICATE OF INTERESTED PERSONS

The undersigned, counsel for the Plaintiff/Appellee, does hereby certify that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal:

1. Roger Reeves, Plaintiff/Appellee;

2. Jim Waide, Attorney for Plaintiff/Appellee;

3. Sanderson Plumbing Products, Inc., Defendant/ Appellant; and

4. Taylor B. Smith, Attorney for Defendant/ Appellant.

JIM WAIDE

Appendix

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Cause No.: 1:98-60334

ROGER REEVES,

Plaintiff/Appellee,

VERSUS

SANDERSON PLUMBING PRODUCTS, INC.,

Defendant/Appellant.

STATEMENT OF COUNSEL AS TO GROUNDS
FOR EN BANC CONSIDERATION

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following panel decisions of the United States Court of Appeals for the Fifth Circuit or the Supreme Court of the United States:

Smith v. Berry Co., 165 F.3d 390, 395 (5th Cir. 1999);

Portis v. First Natl. Bank of New Albany, Mississippi, 34 F.3d 325, 329 (5th Cir. 1994);

Weaver v. Amoco Prod. Co., 66 F.3d 85, 86-87 (5th Cir. 1995);

Woodhouse v. Magnolia Hosp., 92 F.3d 248 (5th Cir. 1996);

Ray v. Iuka Municipal Sep. School Dist., 51 F.3d 1246, 1250 (5th Cir. 1995); and

EEOC v. Manville Sales Corp., 27 F.3d 1089, 1094 (5th Cir. 1994).

JIM WAIDE

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Cause No.: 1:98-60334

ROGER REEVES,

Plaintiff/Appellee,

VERSUS

SANDERSON PLUMBING PRODUCTS, INC.,

Defendant/Appellant.

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

1. What evidence is necessary to constitute "substantial evidence" in order to permit a jury to decide an age discrimination case?

2. Is evidence of pretext, coupled with evidence of age bias by the person who caused the adverse decision, sufficient evidence of age discrimination so as to permit the jury to decide whether there has been age discrimination?

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3. May the Court of Appeals, in reviewing a jury verdict "balance" the factors it considers to be indicative of no age discrimination, against the factors the jury found to constitute age discrimination?

4. Did the panel's decision in this cause contravene this Court's previous teachings as to the required proof necessary to present a jury issue in an age discrimination case?

JIM WAIDE

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Cause No.: 1:98-60334

ROGER REEVES,

Plaintiff/Appellee,

VERSUS

SANDERSON PLUMBING PRODUCTS, INC.,

Defendant/Appellant.

STATEMENT OF THE ISSUES

5. What evidence is necessary to constitute "substantial evidence" in order to permit a jury to decide an age discrimination case?

6. Is evidence of pretext, coupled with evidence of age bias by the person who caused the adverse decision, sufficient evidence of age discrimination so as to permit the jury to decide whether there has been age discrimination?

7. May the Court of Appeals, in reviewing a jury verdict "balance" the factors it considers to be indicative of no age discrimination, against the factors the jury found to constitute age discrimination?

8. Did the panel's decision in this cause contravene this Court's previous teachings as to the required proof necessary to present a jury issue in an age discrimination case?

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Cause No.: 1:98-60334

ROGER REEVES,

Plaintiff/Appellee,

VERSUS

SANDERSON PLUMBING PRODUCTS, INC.,

Defendant/Appellant.

STATEMENT OF THE PROCEEDINGS AND DISPOSITION OF THE CASE

A jury in the Northern District of Mississippi found the Defendant guilty of willful age discrimination and awarded a judgment of Seventy Thousand Dollars ($70,000.00). R., Vol. 2, p. 275. The trial court denied Defendant's Motion for Judgment as a Matter of Law. R., Vol. 2, p. 287. Defendant appealed to this Court. R., Vol. 2, p. 290.

On appeal, the panel found evidence of pretext, and also found that one of the decision makers had made age-biased statements. Nevertheless, the panel concluded there was insufficient evidence to present a jury question in view of the ages of other managerial employees, and in

view of the age of other persons involved in the discharge decision.[1]

FACTS

Plaintiff Roger Reeves worked for the Defendant or its predecessor for forty (40) years, the last twenty (20) as a supervisor. He was fired at age fifty-seven (57). R., Vol. 3, p. 1-4.

According to Plaintiff's evidence, the "absolute power" of the company was Powe Chestnut the husband of the owner. R., Vol. 3, pp. 4, 80-84. Chestnut was Director of Manufacturing in 1995 when Plaintiff was fired. However, even before he received this position, he had written his supposed supervisor a note containing profanity and instructing his so-called boss, the Director of Manufacturing, to "wake up" and learn to do his job. R., Vol. 3, pp. 109-110, 113; R., Vol. 4, p. 220, Exhibit P-7.

Records introduced at trial indicate Plaintiff's productivity was superior to any other supervisors with whom he was compared. For example, his productivity compared favorably to the thirty-five (35) year old supervisor on the "regular line". R., Vol. 3, pp. 78-79.

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1. This was a factual error by the panel. A jury was entitled to find the person who actually caused Plaintiff's discharge was Powe Chestnut, the individual who made the age-biased statements. R., Vol. 3, pp. 109-110; R., Vol. 4, p. 220, Exhibit P-7.

According to the testimony at trial, Powe Chestnut, the "absolute power" at the plant, treated the Plaintiff "like a child". R., Vol. 3, pp. 80-83. While Chestnut was abusive to employees generally, this treatment was "nothing compared" to the way Chestnut treated Plaintiff. R., Vol. 3, pp. 82-83.

At the end of 1993, Plaintiff was placed on probation by Chestnut, based on Chestnut's claim that productivity was down. However, production records demonstrated Reeves' productivity exceeded those of the younger supervisor, Oswalt, who was not placed on probation. R., Vol. 4, p. 226.

At trial, Chestnut testified that he did not make the decision to put Plaintiff on probation. R., Vol. 3, pp. 198-199, R., Vol. 4, p. 235. However, Plaintiff introduced an affidavit signed by Chestnut stating he is the person who recommended Plaintiff for probation in 1993. R., Vol. 4, pp. 235-237.

After being placed on probation in 1993, Plaintiff's productivity increased even further, and he received a merit pay raise. R., Vol. 3, pp. 16-17, 65, 113.

At the time of Plaintiff's termination his productivity "goal" was forty-eight (48) units per man hour, but he was running sixty (60) units per man hour. R., Vol. 3, pp. 16-17.

Approximately two (2) months before Plaintiff was terminated, Chestnut approached him when he was trying

to get a machine running and told him that he was "too damn old to do the job". R., Vol. 3, pp. 26-59. This preceded an earlier comment by Chestnut that Plaintiff was "so old that he must have come over on the Mayflower". R., Vol. 3, pp. 26, 59.

Chestnut did not deny the age-based comments, but testified that he was only joking. R., Vol. 4, pp. 214-216.

According to Reeves, the only reason given him for discharge at the time of trial was that he had caused an employee (Coley) to be paid for two (2) days when she was not working. R., Vol. 3, pp. 30-55. This was an unprecedented reason, since normal practice was to take any overpayment out of the employee's check. R., Vol. 3, pp. 72-73.

This error in overpaying Coley was not Plaintiff's fault. Plaintiff was actually in the hospital on the two (2) days for which Coley was claimed to have been erroneously paid. In fact, it was Plaintiff's immediate supervisor, Caldwell, who had made this error. Plaintiff merely delivered the contents of a note from Caldwell to the company office. R., Vol. 3, p. 23. Caldwell, age forty-five (45), was fired at the same time as Plaintiff. R., Vol. 3, p. 151; R., Vol. 4, p. 209.

At the time of trial, Defendant had used three (3) replacements for Plaintiff. All were in their thirties. R., Vol. 3, p. 101-102, R, Vol. 4, p. 224.

Defendant anticipated, and actually had, a loss of productivity after Plaintiff's absence. According to Ms. Sanderson, owner of the company, and husband of Chestnut, there will always be a "learning curve" when a new supervisor takes over. R., Vol. 3, p. 102.

Contrary to the reason given when Plaintiff was discharged, the defense at trial was that Plaintiff was fired because an "investigation" had revealed that he was causing numerous employees to be overpaid or was not properly "writing them up" when they were absent or tardy. According to the Defendant, failure to write up absent or tardy employees was a "falsification" of company records which justified discharge. R., Vol. 3, pp. 113, 115, 119.

Plaintiff vigorously disputed the Defendant's claims that any employees were late, and testified that he made certain that the workers were on time. R., Vol. 3, pp. 18-19, 73; R., Vol. 4, pp. 241-245, 246-249. Furthermore, the individual responsible for preparing writeups was Plaintiff's forty-five (45) years old supervisor. R., Vol. 3, pp. 20-21.

At trial, the Defendant claimed the termination decision was made by Chestnut's wife, Mrs. Sanderson, on the recommendation of Chestnut and others. R., Vol. 3, pp. 114-115, 150-151; R., Vol. 4, pp. 209-220. This was inconsistent with the corporate deposition where the Defendant testified that four (4) people, including Chestnut, made the decision. R., Vol. 3, pp. 157-158. Chestnut alone initiated and directed the "investigation"

which caused Plaintiff's termination. R., Vol. 3, pp. 158-184; R., Vol. 4, pp. 185-203. Of the persons who participated in the termination decision, the only person familiar with the investigation was Chestnut. R., Vol. 3, p. 159. Furthermore, Chestnut "ran the plant" and was the "absolute power". R., Vol. 3, p. 8.

PANEL DECISION

The panel agreed that Plaintiff produced sufficient evidence of pretext. The panel wrote:

> " . . . Based on this evidence, claims Reeves, a reasonable jury could have found that Sanderson's explanation for its employment decision was pretextual. "On this point, Reeves may very well be correct."

Opinion, p. 9.

However, the panel then concluded that, even so, the evidence was not sufficient. The panel wrote:

> "Even so, whether Sanderson was forthright in its explanation for firing Reeves is not dispositive of a finding of liability under ADEA. We must, as an essential final step, determine whether Reeves presented sufficient evidence that his age motivated Sanderson's employment decision".

Opinion, p. 9.

The panel then concluded there was insufficient evidence of age discrimination because the comments by Chestnut were not made "in the direct context of Reeves' termination", panel Opinion, p. 10, because two (2) of the decision makers[2] were over fifty (50), panel Opinion, p. 10, and because the company retained people in management who were over the age of fifty (50), "including several employees in their late sixties". Panel Opinion, p. 11.

Plaintiff believes that this type of analysis constitutes a forbidden "balancing" of the evidence and undermines the Seventh Amendment of the United States Constitution guaranteeing the right to jury trial. The panel's holding is inconsistent with many of this Court's precedents.

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2. As earlier stated, the panel's finding that other decision makers were in their fifties is misleading. There was ample evidence from which a jury could find Powe Chestnut, who made the age-biased statements, was the person who caused the Plaintiff to be fired. R., Vol. 3, pp. 109-110, 113; R., Vol. 4, p. 226, Exhibit P-7.

Appendix

ARGUMENT

BY FINDING THAT AGE-BASED COMMENTS BY THE PERSON WHO "CAUSED" THE TERMINATION DECISION, NEAR IN POINT OF TIME TO THE TERMINATION DECISION, WAS INSUFFICIENT EVIDENCE OF AGE DISCRIMINATION, THE PANEL CONTRAVENED DECISIONS OF THIS COURT. ACCORDINGLY, PLAINTIFF REQUESTS EN BANC CONSIDERATION WHEREIN THIS COURT CAN CLEARLY DELINEATE WHAT A PLAINTIFF NEED DO TO PRESENT A JURY ISSUE IN AN AGE DISCRIMINATION CASE.

In *Rhodes v. Guiberson Oil & Tool*, 39 F.3d 537 (5th Cir. 1996), this Court announced a "pretext plus" test. Under this test for age discrimination, it was necessary for Plaintiff to produce proof of both pretext and direct evidence of age discrimination. However, *Rhodes* was reversed en banc, with this Court holding that independent direct evidence of age discrimination is necessary only in some, not in all, cases. *See Rhodes*, en banc, 75 F.3d at 994.

This case was one of those cases where the evidence of "pretext" was held to be insufficient evidence of age discrimination. Thus, the panel determined some additional evidence of age discrimination was necessary. The only other evidence of age discrimination was Plaintiff's being treated differently from younger persons

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and the "age-based statements" by a decision maker. The panel held such evidence insufficient when compared to contrary evidence.

In this regard, the panel's decision cannot be squared with the decisions of other panels. Even where there has not been shown any evidence of pretext, and age-based statements are the *only* evidence of age discrimination, some panels have held this evidence is sufficient. Furthermore, where evidence of age-biased statements have existed, other panels have not "balanced" contrary evidence. These panels have acted consistently with the rule of *Boeing v. Shipman*, 411 F.2d 365, 374-375 (5th Cir. 1961), which requires the *jury*, not the court of appeals, to balance the evidence.

In *Weaver v. Amoco Prod. Co.*, 66 F.3d 35, 86-87 (5th Cir. 1995), plaintiff, one of five (5) supervisors who had been laid off during a reduction in force, produced no evidence of age discrimination other than that a supervisor had agreed with plaintiff's statement that "a guy my age doesn't have much future left". This statement in *Weaver* is less direct than that involved in this case, and yet was held sufficient evidence to present a jury issue on the age discrimination issue. Furthermore, the *Weaver* panel did not balance the defense's evidence against the age-based statement.

In *Woodhouse v. Magnolia Hosp.*, 92 F.3d 248 (5th Cir. 1996), the President of the board of trustees of the hospital had said that "old people" would be one group who would be chosen for a layoff. This Court held that

such a statement could constitute "substantial evidence" of age discrimination, even though the president of the board was not involved in choosing plaintiff for the layoff.

In *Portis v. First National Bank of New Albany, Mississippi*, 34 F.3d 325, 329 (5th Cir. 1994), plaintiff's supervisor's statement that plaintiff would be paid less because she was a woman was held as evidence of sex discrimination in a demotion case, even though this statement was unrelated to the demotion decision in issue.

Smith v. Berry Co., 165 F.3d 390, 394 (5th Cir. 1999) held that a memorandum by a company president referring to older employees as a "very difficult group", was evidence of age discrimination, although the memo predated the discharge decision by six (6) years, and there was no evidence that this statement related to plaintiff.

Ray v. Iuka Municipal Sep. School Dist., 51 F.3d 1246, 1250 (5th Cir. 1995) found substantial evidence of a retaliatory motive from a statement made by one member of a school board, even though the case contained no evidence of any such discriminatory statements by a majority of the board, which made the discharge decision.

EEOC v. Manville Sales Corp., 27 F.3d 1089, 1094 (5th Cir. 1994) held that various age-based comments by a district manager over a four (4) year period referring to plaintiff as an "old man was substantial evidence of age discrimination, even though the district manager, as did Chestnut, only recommended the discharge. This Court said that such statements could be "highly probative of discriminatory intent". 27 F.3d 1089.

In balancing the defense evidence against the evidence of age discrimination, the panel relied on the employer's retaining several employees [over fifty (50)], including "several employees in their late sixties". Panel Opinion, p. 11. Holding it a defense that the company retained many older employees ignores *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 81 L.Ed.2d 718, 729, 104 S.Ct. 2794 (1984) which said:

> "A racially balanced work force cannot immunize an employer for liability for specific acts of discrimination. *Furnco Construction Corp. v. Waters*, 438 U.S. at 579, 57 L.Ed.2d 957, 98 S.Ct. 2943 . . . 'A piece of fruit may well be bruised without being rotten to the core'."

81 L.Ed.2d at 729.

By finding that evidence of the ages of other employees retained, overcame Plaintiff's evidence of age discrimination, the panel not only impermissibly "balanced" the evidence, but disregarded this applicable teaching of the Supreme Court.

CONCLUSION

The evidence in this case is impossible to distinguish from that relied upon by several other panels in upholding jury verdicts. There is little justice when plaintiffs, under practically identical facts, may obtain a jury's consideration but Reeves may not. To maintain

consistency of decisions and to protect the Seventh Amendment of a right to trial by jury, this case should be reheard en banc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jim Waide, attorney for Plaintiff/Appellant, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing to the following:

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THIS the 20 day of May, 1999.

_____
JIM WAIDE